NO. 83-5716

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CHARLES THOMAS CORN,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Did the decision by the Court below comply with the holding of this Court in Sandstrom v. Montana, 442 U.S. 510 (1979)?

2.

Did Petitioner receive effective assistance of counsel at the sentencing phase of his trial?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Charles Thomas Corn, was charged and convicted of malice murder and armed robbery in the Superior Court of Clayton County, Georgia on May 26, 1976. Petitioner was sentenced to death on each count by the same jury. On direct appeal to the Supreme Court of Georgia, that Court reversed the death sentence imposed for armed robbery, but affirmed both convictions and the death sentence for murder. This Court subsequently denied a petition for a writ of certiorari. Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914 (1978). Petitioner filed a petition for habeas corpus relief in the Superior Court of Tattnall County, Georgia. Habeas corpus relief was denied by that Court and the Supreme Court of Georgia affirmed that denial. Corn v. Hopper, 244 Ga. 28, 257 S.E.2d 533 (1979).

A petition for habeas corpus relief was then filed pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia, Atlanta Division. An evidentiary hearing was held before the magistrate on June 17, 1980. A report and recommendation was entered on December 3, 1980 in which the magistrate recommended that habeas corpus relief be granted as to the issue of the jury instructions. Objections were filed by both parties. On June 30, 1981, the district court issued an order in which it declined to follow the magistrate's report and recommendation as to the jury instructions; however, the district court granted habeas corpus relief based on a comment by the trial court on appellate review during the sentencing phase of the trial.

Both the Petitioner and the Respondent filed notices of appeal from the decision entered by the district court. The panel of the Eleventh Circuit reversed the district court's opinion insofar as it granted habeas corpus relief and affirmed the remainder of the district court's decision, thereby denying habeas corpus relief on all counts. Corn v. Zant, 708 F.2d 549 (11th Cir. 1983). Petitioner filed a suggestion for rehearing en banc which was denied by that Court on August 11, 1983.

PART TWO

STATEMENT OF FACTS

Petitioner was indicted in Clayton County during the August Term, 1975 for armed robbery and murder. Prior to trial a special plea of insanity was heard before a jury with the jury find that Petitioner was competent to stand trial. The case then proceeded to a jury trial on the issue of guilt or innocence.

Two female friends of the victim, Mary Long, came by a Stop-and-Go Store where the victim worked, about 5:30 p.m. on August 15, 1975. Both witnesses identified the Petitioner as the young man they saw in the store at that time. The Petitioner spoke with the two girls and also asked Ms. Long if her boss was there. When the girls left about 6:00 p.m., Petitioner was still in the store.

A short while later several customers stopped by the store. These customers identified the Petitioner as the man who waited on them at the store. All of these customers noticed that Petitioner had blood on his hands and arms. They also testified that the Petitioner was wiping up blood and tinkering with the cash register. There was blood on the cash register and the counter and Petitioner had a rag wrapped around his right hand.

Petitioner told one of the customers, Billy Sweatman, that he had been robbed. Another customer, Rosemary Strickland, testified that Petitioner told her a drunk person with a knife had tried to rob him and that he been cut in the struggle. When Ms. Strickland offered to call someone to help, Petitioner told her he had already called the police. Ms. Strickland noticed that the cash drawer of the register was opened.

Mark Crabb, a frequent customer at the store, stopped there on August 15th and saw Ms. Long. Crabb also saw a man in jeans and a t-shirt whom he later identified as the Petitioner.

Petitioner had also been identified by the witnesses as wearing blue jeans and a t-shirt. Crabb left the store, but had to return a few minutes later to buy some soft drinks. When he entered the store, he did not see anyone and thought Ms. Long was in the back of the store. He then noticed blood on the counter and drops of blood leading to a back room. Crabb opened the store and found Ms. Long on the floor. He felt for her pulse but could not find one. Ms. Crabb then called the police.

The autopsy of the victim revealed multiple stab wounds, abrasions and lacerations. There were four major stab wounds, two in front and two in back, the fatal one being through the chest. It was also ascertained that about $47.00 was missing from the register of the store.

On August 17th, Petitioner came to the Riverdale police station to pay a traffic ticket. It was noticed that the Petitioner fit the description of the suspect in the murder; therefore, he was advised of his rights and questioned about the injury on his hand. He said he had cut his hand on a lawnmower.

Captain Quinlan of the Clayton County Police Department was called in and he advised Petitioner of his rights a second time. Petitioner signed a waiver and made a statement in which he claimed that he spent Friday afternoon of August 15th riding around with his wife and child, going to a hamburger place and then returning home late that night. Captain Quinlan investigated the Petitioner's story and found that it did not check out. He then informed the Petitioner of this fact and asked the Petitioner to accompany him to the Clayton County Police Department. Petitioner willingly went with Captain Quinlan.

At trial a Jackson v. Denno hearing was held during which Captain Quinlan testified that Petitioner made different

statements. Petitioner first claimed that on the evening of August 15th, he was driving on I-85 and that when he came to Roberts Drive, a white van pulled out in front of him and then police cars later followed. Petitioner implied that the perpetrator of the murder had been in the van.

At this point, Quinlan ended the questioning and Petitioner's wife came in to see him. Petitioner was advised that anything he said to his wife could be used against him. When Petitioner's wife asked him he had done "it," Petitioner replied, "yes, I killed the girl, but I didn't mean to." (T. 618). Captain Quinlan later resumed his conversation with the Petitioner. Petitioner stated that he went to one store where he talked to a woman but stated he could not bring himself to hurt her. Petitioner then stated that he went to a Stop-and-Go store and that the girl there lunged at him. At this point Petitioner became hysterical and the questioning ceased.

Petitioner testified that he was not advised of his rights and that he had been threatened prior to making the statements. He also claimed that all he could remember was being in a Clayton County Hospital and then at Central State Hospital. The trial court ruled, however, that Petitioner had been advised of his rights and that the statements were voluntary.

A witness was presented at trial who testified that Petitioner came into her store earlier in the day on August 15th, and asked her if she was afraid to be there alone. She testified that Petitioner appeared to be nervous and paced around the store for several minutes. The woman's husband also testified at trial and identified the Petitioner as being the man he saw at the store on that date.

Further testimony showed that on August 15th, Petitioner came to the apartment of his in-laws with a cut hand. Petitioner told his in-laws that a man had run him off the

road. He took off his tennis shoes which were bloody and threw a rag into a corner. Petitioner's wife also saw him that evening. He told her his hand had been cut when a man ran him off the road and pulled a knife on him. Petitioner went to a hospital to have his hand treated and told the receptionist he had injured his hand while cutting meat.

Petitioner's wife testified at trial that Petitioner had beaten her on occasion and had pushed her down the stairs once when she was pregnant. She testified that Petitioner was not insane, but that he was smart and had a violent temper. Petitioner's wife also turned a steak knife over to the police after she found it hidden in the couch. Police also obtained a pair of jeans, tennis shoes, a rag and a t-shirt.

Blood scrapings taken from the store, tennis shoes and knife were found to be of the same blood type as the victim and the Petitioner. There was also testimony that prints lifted from the cash register and counter matched those of the Petitioner's palm and fingers.

In the defense presented at trial, Petitioner did not deny the crime, but chose to assert a defense of insanity. Petitioner presented the testimony of Dr. William P. Sapp in support of his defense. Dr. Sapp testified that Petitioner suffered from general brain damage, seizures and was psychotic. He also testified that Petitioner exhibited the four major symptoms of schizophrenia. In Dr. Sapp's opinion, Petitioner was paranoid and had a defective memory. Dr. Sapp concluded that Petitioner was not capable of knowing right from wrong on the date of the crime. The state called Dr. Miguel Bosch in rebuttal. Dr. Bosch testified that Petitioner was not schizophrenic, was not paranoid and was not psychotic. Dr. Bosch did not have an opinion as to whether Petitioner knew

right from wrong on the date of the crime, stating that it was impossible for him to give such an opinion without observing the Petitioner on that date.

Any further facts will be presented as necessary for an explanation of the issues raised by the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS COMPLIES WITH THIS COURT'S HOLDING IN SANDSTROM V. MONTANA, 442 U.S. 510 (1979).

Petitioner raises various allegations concerning the holding by the Eleventh Circuit Court of Appeals in relation to the charge of the court. Petitioner asserts that the holding of the court below is in direct conflict with the holding of this Court in Sandstrom v. Montana, 442 U.S. 510 (1979). Petitioner also asserts that there are ambiguities left by the decision of this Court in Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983) which have resulted in a split in the lower courts. Petitioner also asserts that the jury instructions given are incomprehensible and could be interpreted as shifting the burden of persuasion and also violated his due process right to comprehensible jury instructions. Petitioner asserts that this Court should grant certiorari in this case in light of the recent grant of certiorari in the case of Koehler v. Engle, 52 U.S.L.W. 3279 (1983). Respondent submits that as the decision by the Eleventh Circuit Court of Appeals in the instant case was consistent with the prior holdings of this Court, no need exists for the granting of the petition for a writ of certiorari.

In evaluating any jury instructions, this Court has recognized "in determining the effect of [an] instruction on the validity of [a] conviction, . . . a single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-7 (1973). This Court went further to note, "the

question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Id. at 147. Accord, Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Thus, it is essential to examine the charge as a whole before any analysis can be made as to any potential burden shifting effect of any isolated portions of said charge.

In evaluating the charge, the Eleventh Circuit Court of Appeals set forth the entire instruction on intent in the Appendix to its opinion. The following portions of the charge are pertinent to this Court's evaluation of the instruction as to malice:

> I charge you that a person commits murder when he unlawfully and with malice aforethought either express or implied causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element in murder and it must exist before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. . . .

The law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse. The accused may show such circumstances to the Jury unless such circumstances appear from the evidence produced against the accused. But he is not required to do so. If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exits. If, however, the evidence produced against the accused, if there be such, does not disclose the killing was done without malice, the accused may show that it was done without malice. But he is not required to do so.

I charge, you however, that this presumption which arises against the slayer where an intentional homicide is shown does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt that the Defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the Defendant himself, the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced

against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the Defendant may, but is not required to, show mitigation or excuse.

Corn v. Zant, supra at 568-9.

The trial court later charged the jury concerning various other elements of the crime, including intent. The court charged as follows:

I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequence of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of the facts, and that is you, the Jury, in this case, may find such intention upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the acts for which the accused is prosecuted.

Corn v. Zant, supra at 569. The court then charged on reasonable doubt and presented the charge on insanity. After giving the charge on insanity, the court charged,

> I charge you that intention is an essential element of any crime and that the burden is on the State to prove such intention beyond a reasonable doubt. While the burden is not on the Defendant to disprove intention, nonetheless, if he introduces some competent evidence of insanity, which might tend to negate evil intention in the Defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the Defendant was sane at the time of the alleged crime, and therefore had the requisite criminal intent.

Id. At the conclusion of the charge on insanity, the court again reiterated that under Georgia law, " a person will not be presumed to act with criminal intent." Id.

Petitioner challenged this charge in two respects. Petitioner first asserts that the charge impermissibly shifts the burden of proof on the element of malice. Secondly, Petitioner asserts that the charge shifts the burden of proof on the question of intent. Petitioner now asserts that the Eleventh Circuit Court of Appeals did not properly apply the principles of Sandstrom v. Montana in making its determination that the charge was constitutional.

In evaluating the charge, the Eleventh Circuit Court of Appeals correctly noted that the instructions in Sandstrom, supra, contained no curative language concerning the fact that the presumption of intent could be rebutted. The jurors in

Sandstrom "were not told that the presumption could be rebutted . . . by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." Sandstrom, supra, 442 U.S. at 517. In the instant case, the charge made an unequivocal statement that the presumption could be rebutted and went further to state that a person would not be presumed to act with criminal intention. Furthermore, the Eleventh Circuit Court of Appeals concluded the following:

> Moreover, the instructions were clear that the accused "may" show circumstances to negate intent, "[b]ut he is not required to do so," and that he "may" show that the killing was done without malice, "[b]ut he is not required to do so." . . . The charge is replete with cautious explanations that refute Corn's claim that an irrebuttable presumption weighed against him.

Corn, supra at 559.

The Eleventh Circuit also noted that the trial court specifically stated that if the evidence produced against the defendant showed a lack of malice, then the presumption that the homicide was malicious did not exist. The trial court also specifically stated that the presumption did not arise unless it was proven beyond a reasonable doubt that the defendant was the intentional slayer. Thus, the court concluded "at most, there was a permissible inference (footnote omitted) that the defendant could, if he so chose, introduce mitigating evidence." Corn, supra at 559 (emphasis in original).

This Court noted in County Court of Ulster v. Allen, 442 U.S. 140, 156 (1979), that "inferences and presumptions are a staple over our adversary system of factfinding." The test in evaluating a presumption or inference is that "the device must

not undermine the factfinders responsibility at trial, based on the evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Id.

In evaluating the instructions in the instant case, Respondent submits that the Eleventh Circuit Court of Appeals accurately found that the instructions were fair and balanced and that any "untoward effect any part of the instruction may have had was entirely vitiated by the clear statement of the state's responsibility to prove intent beyond a reasonable doubt." Corn, supra at 560.

Respondent submits that the record clearly shows that the Court of Appeals properly applied the holdings of this Court in concluding that the charge in the instant case created at most a permissive inference and that the charge as a whole did not impermissibly shift the burden of proof to the Petitioner in violation of his constitutional rights. Therefore, as the Eleventh Circuit Court of Appeals properly applied the holdings of this Court in making its determination, no reason exists for this Court to grant certiorari to review the issue.

Petitioner would have this Court grant certiorari to consider issues allegedly left ambiguous in Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983). Respondent asserts that this Court need not grant certiorari in this case because there is no need to resort to a harmless error analysis. Even though Respondent does assert that no harm resulted from the charge in the instant case and that this Court could conclude that the charge was harmless error, no such analysis is necessary as Respondent asserts that charge was simply not impermissibly burden shifting. Therefore, this does not serve as a basis for the granting of certiorari.

Petitioner has finally asserted that this Court should grant certiorari based on the recent granting of certiorari in the case of Koehler v. Engle, 52 U.S.L.W. 3279 (1983). Once

again, Respondent asserts that the granting of certiorari in that case does not serve as a basis for certiorari in the instant case. In Koehler v. Engle, the Sixth Circuit Court of Appeals ruled that the charge was impermissibly burden shifting and was not harmless error, completely contrary to the ruling in the instant case. Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983). The Eleventh Circuit Court of Appeals in the instant case case complied with the prior holdings of this Court, therefore, this serves as no justification for the granting of the petition for a writ of certiorari.

Therefore, Respondent requests that this Court decline to grant the petition for a writ of certiorari based on the jury charge in the instant case.

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL.

Petitioner has challenged the effectiveness of his trial counsel, primarily based on the alleged lack of mitigating evidence presented by trial counsel. Petitioner asserts that counsel should have presented more evidence in mitigation concerning his alleged mental illness.

The Eleventh Circuit Court of Appeals examined the effectiveness of trial counsel. The court determined that all allegations pertaining to the effectiveness of trial counsel were without merit. "The appropriate inquiry is whether the Petitioner was represented by counsel reasonably likely to render and in fact rendered [sic] reasonably effective assistance. . . . Rather than taking isolated instances out of context, we determine whether effective assistance was rendered based on the totality of the circumstances." Corn, supra at 560-561. The court noted that the complaints lodged by Petitioner were primarily matters of trial strategy and, thus,

were the decisions of the attorney. The court noted that the Sixth Amendment did not mean errorless counsel or counsel judged ineffective by hindsight. The court also noted the standard previously set forth in Washington v. Strickland, 653 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983). The court concluded that Petitioner would have to show, even if his counsel were ineffective, that it worked to his actual and substantial disadvantage. Therefore, the Court concluded "we find that Corn's trial counsel made strategic decisions reasonably calculated to afford effective representation, and Corn has not shown that those choices so prejudiced him as to violate any constitutionally protected right." Id. at 561.

Counsel testified in an evidentiary hearing before the United States Magistrate. It was noted that the only witness testifying on behalf of the Petitioner at the sentencing phase was his mother. Petitioner's wife was called as a state's witness at the sentencing phase. The attorney, Mr. McWhorter, testified that he presumed he could have brought Dr. Sapp back in at the sentencing phase of the trial, but he chose not to do so. (F.H.T. 90). He testified that he did not think Dr. Butcher's opinion would have been helpful at the time. Therefore, it is clear that Mr. McWhorter made a tactical decision concerning the testimony of other witnesses and decided to rely on the testimony presented at the guilt-innocence phase of the trial and the testimony of Petitioner's mother, rather than presenting evidence which he did not feel would be helpful. As this is clearly a tactical decision by counsel, it does not serve as the basis for a claim of ineffective assistance. Therefore, no reason exists for the granting of a petition for a writ of certiorari in the instant

case as the decision by the Eleventh Circuit Court of Appeals finding Petitioner's counsel to be effective does not contradict any decisions of this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Charles Thomas Corn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This 14 day of December, 1983.

Mary Beth Westmoreland
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